

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN DAVIS, CEDRINA DAVIS, and KEVIN
MILLER,

UNPUBLISHED
January 19, 2006

Plaintiffs,

and

PERRY GULLETTE, a/k/a TONY GULLETTE,

Plaintiff-Appellee,

and

MICHAEL EUBANKS and LE MELVA
EUBANKS,

Plaintiffs/Counter-Defendants,

v

No. 262190
Wayne Circuit Court
LC No. 03-332564-CZ

MEADE GROUP, INC., d/b/a POINTE DODGE,
INC.,

Defendant/Counter-Plaintiff-
Appellant,

and

KENNETH MEADE, BARRON MEADE, a/k/a
BARON MEADE, and TERRY TADLOCK,

Defendants-Appellants.

Before: O'Connell, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Defendants, a car dealership and certain of its officers, appeal by leave granted from the circuit court's order denying their motion for summary disposition in connection with plaintiff

Perry Gullette, a/k/a Tony Gullette. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Gullette was a salesperson for defendant Meade Group/Pointe Dodge from 1986 to 2002. In September 2003, Gullette, along with the other plaintiffs, filed suit alleging racial discrimination and related claims. However, one month after Gullette ended his employment, he signed a release form stating that he released all defendants from any causes of action in consideration of receipt of \$959.05. Defendants sought summary disposition in connection with Gullette on the basis of that release. The trial court denied the motion on the ground that the consideration for the release was money to which Gullette was already entitled, which thus could not constitute consideration for purposes creating a valid release.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). A motion under MCR 2.116(C)(7) should be granted only if no factual development could establish a basis for recovery. *Amburgey v Sauder*, 238 Mich App 228, 231; 605 NW2d 84 (1999). When deciding such a motion, the court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial. *Id.*

To be valid, a release must be supported by consideration. *Babcock v Public Bank*, 366 Mich 124, 135; 114 NW2d 159 (1962). See also *Paterek v 6600 Limited*, 186 Mich App 445, 451; 465 NW2d 342 (1990). "Under the preexisting duty rule, it is well settled that doing what one is legally bound to do is not consideration for a new promise." *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000).

While Gullette was employed with Meade Group/Pointe Dodge, the latter deducted from his commissions premiums for a disability insurance policy. Before Gullette resigned, however, Meade Group/Pointe Dodge let the policy lapse, while continuing to withhold money for the premiums. Upon leaving the company, Gullette requested a refund of the premiums he had paid against the lapsed policy; defendants calculated the amount, and then induced Gullette to sign a release of all claims against them in consideration of that refund.

The Meade Group's director of human resources stated by affidavit that the company would have provided benefits had Gullette become disabled after the policy had lapsed. Defendants reiterate this argument on appeal, stating that "Meade simply self insured the obligation."

The question whether Meade wholly deprived Gullette of the value of those funds because they were earmarked for insurance which was not provided, or whether Meade became directly responsible to Gullette for equivalent insurance should a claim have arisen, would normally require jury resolution. See *Haji v Prevention Ins Agency*, 196 Mich App 84, 87-88; 492 NW2d 460 (1992) (stating that whether valid consideration exists is a question of fact for the trier of fact). However, in this case, defendants' counsel conceded that the \$959.05 was Gullette's property all along.

At the first hearing on the motion, defendants' counsel reported that defendants' affiant explained that the money "had been withheld from [Gullette's] commission checks for payments

on disability premiums and that he asked to have the money returned and they returned it.” Counsel continued, “The fact that it was money that was owed to him does not mean that it was not consideration for the release.” The trial court stated, “I guess I am not sure if there was any great dispute this was in fact his money and they repaid it to him” Plaintiffs’ attorney asserted, “They don’t dispute it, they say it was his money,” inducing the trial court to agree. Defendants did not seize the obvious opportunity to argue that Meade rightfully withheld the \$959.05 in exchange for some alternative plan to cover Gullette’s disability insurance needs, but argued exclusively that the money was consideration because it was so described “within the 4 corners of the release,” adding, “it doesn’t make any difference whether it is money that’s already owed to the plaintiff.” Defendants thus waived the argument that Meade had properly withheld the money in the first instance in exchange for assuming responsibility for Gullette’s disability insurance coverage.

Defendants also mistakenly rely on *Leahan v Stroh Brewery Co*, 420 Mich 108; 359 NW2d 524 (1984). In that case, a departing employee signed a document that released the employer from legal claims, but that also guaranteed the employee continuing employment for several months, plus a sum certain for consulting services to follow for two years thereafter. *Id.* at 110 n 1. The employee maintained that none of the consideration received was for the release, but the Supreme Court held that because the release stated that the consideration received as part of the severance package supported the release, the employee could not proceed against the employer without first tendering back that consideration. *Id.* at 113. *Leahan* is distinguishable from the instant case. In this case, defendants conceded that the full amount paid over to Gullette was money to which he was lawfully entitled. Hence, there was no compensation that could be attributed to the release, unlike the case in *Leahan*.

Because Gullette demanded, and received, money that was rightfully his, that transfer could not satisfy the requirement for consideration. *Yerkovich, supra* at 740-741. Therefore, Gullette had no obligation to offer it back before proceeding against defendants in court. The trial court correctly ruled that the release was invalid and that defendants were not entitled to summary disposition.

Affirmed.

/s/ Peter D. O’Connell
/s/ Michael R. Smolenski
/s/ Michael J. Talbot